78-5471

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. _____

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SUPREME COURT, U.S.

THOMAS W. WHALEN,

Petitioner
v.
UNITED STATES OF AMERICA,

Respondent

and

JAMES E. PYNES,

Petitioner
v.
UNITED STATES OF AMERICA,

Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioners, Thomas W. Whalen and James E. Pynes, who are now held at Lorton Reformatory in Lorton, Virginia, and who were represented both at trial and on appeal by court-appointed attorneys, ask leave through their undersigned attorneys, to file the attached Consolidated Petition for Writs of Certiorari to the District of Columbia Court of Appeals without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53, ¶1.

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CONSOLIDATED PETITIONS FOR WRITS OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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CONSOLIDATED PETITIONS FOR WRITS OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS[1/]

Thomas W. Whalen and James E. Pynes petition for writs of certiorari to review the judgments of the District of Columbia Court of Appeals in their respective cases.

1/ Both cases present the same issue and are thus consolidated pursuant to Supreme Court Rule 23(jO(5). Counsel also direct the Court's attention to their Petition For A Writ Of Certiorari in Hilton v. United States, No. 78-5350 (filed September 5, 1978), which presents a variation of the issue raised in the instant Consolidated Petition

OPINIONS BELOW

(Whalen)

The opinion of a division of the District of Columbia Court of Appeals affirming petitioner Whalen's conviction is reported at 379 A.2d 1152 (1977) and is attached hereto as Appendix A, infra, pp. 1a-15a. The separate Order of that court denying petitioner Whalen's Petition For Rehearing Or In The Alternative For Rehearing En Banc is reported at 388 A.2d 894 (1978) and is attached hereto as Appendix B, infra, pp. 16a-17a.

(Pynes)

The opinion of a division of the District of Columbia Court of Appeals affirming petitioner Pynes' conviction is reported at 385 A.2d 772 (1978) and is attached hereto as Appendix C, infra, pp. 18a-22a. The separate Order of that court denying petitioner Pynes' Petition For Rehearing Or In The Alternative For Rehearing En Banc is unreported and is attached hereto as Appendix D, infra, p. 23a.

JURISDICTION

(Whalen)

On January 8-16, 1974, petitioner Whalen was tried by a jury in the District of Columbia Superior Court on a seven count indictment for the felony-murder of one Rebecca Reiser during the course of a rape, robbery and burglary. He was convicted on five counts and was subsequently sentenced on March 4, 1974 to concurrent terms of twenty years to life imprisonment for the felony-murder (rape) and felony-murder (first degree burglary) convictions and fifteen years to life imprisonment for the second degree murder conviction. He was also sentenced to consecutive terms of fifteen years to life imprisonment for the rape conviction and ten to thirty years for the first degree burglary conviction.

On June 18, 1974, Mr. Whalen filed a timely notice of appeal in the Superior Court (copy attached as Appendix E, infra, p. 24a), and in his briefs and oral argument before the District of Columbia Court of Appeals, he challenged, inter alia, the constitutionality of the trial court's sentence. The Court of Appeals, however, affirmed his convictions for felony-murder (rape) and rape on November 10, 1977 and subsequently denied his application for rehearing and/or rehearing en banc on July 14, 1978.

(Pynes)

On November 23-29, 1978, petitioner Pynes was tried by a jury in the District of Columbia Superior Court on a three-count indictment for the felony-murder of one Overton Bonner during an armed kidnapping. He was convicted on all counts and was subsequently sentenced on January 21, 1974 to concurrent terms of twenty years to life imprisonment on each of the murder convictions and to a consecutive term of fifteen years to life imprisonment on the kidnapping conviction.

On January 23, 1974, Mr. Pynes filed a timely notice of appeal in the Superior Court (copy attached as Appendix F, infra, p. 25a), and in his briefs and oral argument before the District of Columbia Court of Appeals, he challenged, inter alia, the constitutionality of the trial court's sentence. The Court of Appeals, however, affirmed his convictions on April 26, 1978 and subsequently denied his application for rehearing and/or rehearing en banc on June 27, 1978.

The jurisdiction of this Court over both cases is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the doctrine of merger of offenses, an integral

part of the Double Jeopardy Clause of the Fifth Amendment to the Federal Constitution, precludes the respective trial courts from imposing consecutive sentences on (1) petitioner Whalen for felony-murder and the underlying offense of rape and (2) petitioner Pynes for felony-murder and the underlying offense of armed kidnapping?

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in both cases is the Double Jeopardy Clause of the Fifth Amendment to the Federal Constitution which provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASES

(Whalen)

Petitioner Whalen was charged in a fifteen count indictment for, inter alia, the offenses of: (1) felony-murder (rape) (22 D.C. Code §§2401, 2404); (2) felony-murder (robbery) (22 D.C. Code §§2401, 2404); (3) felony-murder (first degree burglary) (22 D.C. Code §§2401, 2404); (4) second degree murder (22 D.C. Code §2403); (5) rape (22 D.C. Code §2801); (6) robbery (22 D.C. Code §2901); and (7) first degree burglary (22 D.C. Code §1801(a)).

At trial, the prosecution's theory was that Mr. Whalen, a maintenance worker at the apartment complex where the victim resided, killed her during the course of a burglary, robbery, and rape. The Government's case was based primarily on the petitioner's fingerprint and thumbprint found in the deceased's apartment and witnesses who placed him at the apartment complex on the morning of the incident.

At the conclusion of the Government's case, the court granted the petitioner's motions for judgment of acquittal as to the felony-murder (robbery) and robbery counts. The jury subsequently returned verdicts of guilty on the remaining five

counts of the indictment. The trial court eventually sentenced the petitioner to concurrent terms of twenty years to life on each of the felony-murder (rape) and felony-murder (first degree burglary) convictions and fifteen years to life on the second degree murder offense. The court also imposed sentences of fifteen years to life for rape, to run consecutively with the murder sentences, and ten to thirty years for first-degree burglary, to run consecutively with both the murder and rape sentences.

(Pynes)

Petitioner Pynes was charged by indictment with counts of: (1) first degree premeditated murder (22 D.C. Code §2401); (2) felony-murder (22 D.C. Code §§2401, 2404); (3) kidnapping while armed (22 D.C. Code §§2101, 3202); and (4) unarmed kidnapping (22 D.C. Code §2101).

At trial, the Government's theory of the case was that Mr. Pynes had killed decedent Bonner in November of 1972 because Bonner was a potential witness against him in an armed robbery that had occurred the previous July. Accordingly, the prosecution introduced evidence concerning both the robbery and the subsequent killing. But for an alleged admission by Pynes to a fellow inmate, Raymond Monroe, the evidence that Pynes killed the deceased was weak and entirely circumstantial. And, Monroe admitted that his main reason for testifying against Mr. Pynes was that the Government authorities had offered to help him with his own pending cases.

After the jury returned verdicts of guilty of all counts, the trial court then sentenced the petitioner to concurrent terms of twenty years to life on each of the murder convictions and imposed a sentence of fifteen years to life on the kidnapping count, to be served consecutively to the sentences imposed for the murder convictions.

REASONS FOR GRANTING THE WRITS

I. THE DECISIONS BELOW AFFIRMING THE TRIAL COURTS' IMPOSITION OF CONSECUTIVE SENTENCES ON PETITIONER WHALEN FOR FELONY-MURDER AND THE UNDERLYING OFFENSE OF RAPE AND ON PETITIONER PYNES FOR FELONY-MURDER AND THE UNDERLYING OFFENSE OF ARMED KIDNAPPING CONFLICT WITH THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT AS INTERPRETED IN PRIOR DECISIONS OF THIS COURT AND THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

In their briefs and oral arguments below, both petitioners contended that the Double Jeopardy Clause precluded any sentence in excess of the mandatory sentence of twenty years to life on the felony-murder charges because the underlying felonies merged into the greater charge. As will be shown below, the lower courts' analyses in rejecting that argument are in conflict with the holdings of this Court and the United States Court of Appeals for the District of Columbia Circuit.

In Whalen v. United States, D.C.App., 379 A.2d 1152 (1977), the petitioner contended that his rape conviction merged into his felony-murder conviction based on the rape charge. The District of Columbia Court of Appeals acknowledged Whalen's argument that the underlying felony (rape) was an "element" of felony-murder and thus that the two offenses would ordinarily merge under the teachings of Blockburger v. United States, 284 U.S. 299 (1932). But, the court mistakenly, however, went on to examine the societal interests protected by the two statutes involved and concluded that because different interests were protected by the rape and felony-murder statutes, no merger occurred. The court further noted that even absent a societal interest analysis, rape was not a lesser included offense of felony (rape) murder because "while the underlying felony is an element of felony-murder it serves a more important function as an intent-divining mechanism." 379 A.2d at 1160.

In Pynes v. United States, D.C.App., 385 A.2d 772 (1978), the petitioner contended that his armed kidnapping conviction merged into his felony-murder conviction based on the kidnapping charge. The Court of Appeals, however, determined that the case did "not involve a single transaction resulting in two crimes, but a series of interrelated acts resulting in two crimes which are defined by separate statutes that are not in pari materia." 385 A.2d at 773. The court further noted that even if the transaction were continuous, the doctrine of merger would be inapplicable "because the transaction offended multiple societal interests and constituted separate offenses." Id. (citations omitted).

The Whalen and Pynes courts' "societal interest analyses" were misguided and led them to incorrect conclusions.[2/] For, if one statutory violation is an "element" of another statutory violation, then for Double Jeopardy purposes, they constitute the "same offense" and thus merge. So much was made

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2/ The Whalen court's "societal interest analysis" was also unwarranted because once it had determined that the convictions merged under Blockberger, its inquiry should have ended, and the rape conviction should have been vacated. For, it is only where no merger occurs that courts examine the interests involved to determine whether consecutive sentences should nonetheless be barred. See Prince v. United States, 352 U.S. 322 (1957); Bell v. United States, 349 U.S. 81 (1955); Ingram v. United States, 122 U.S.App.D.C. 334, 353 F.2d 872 (1965).

The Pynes court's "societal interest analysis" was unnecessary to its disposition of the case because the court there found that the felony-murder and kidnapping were separate "transactions". But that distinction is without substance, for even as the panel recognized, ". . . proof of the felony substitutes for [proof of] premeditation and deliberation by legislative fiat." 385 A.2d at 773. Moreover, were the murder and the kidnapping not part and parcel of a single transaction, there could have been no conviction for felony-murder since the code requires that the killing occur "in prepetrating or attempting to perpetrate. . . the underlying felony." 22 D.C. Code §2401 (1973).

clear in Blockburger v. United States, supra. The issue there was whether the defendant could be punished twice for violations of two distinct narcotics statutes. This Court responded:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. 284 U.S. at 304.

Blockburger, in other words, permits consecutive sentences only where neither of the two statutory violations in question is a lesser included offense of the other. Blockburger makes equally clear that if the same act or transaction results in two statutory violations and one of them has all the elements of the other, then they are considered "the same offense" because one "merges" into the other.

This Court has recently applied those concepts to factual settings analytically indistinguishable from the cases at bar. In Harris v. Oklahoma, 433 U.S. 682 (1977), the defendant was convicted of felony-murde and, in a separate prosecution, was also convicted of robbery with firearms which was the same felony underlying the felony-murder conviction. This Court, in reversing the second conviction, held that:

> When, as here, conviction for a greater crime, murder, cannot be had without a conviction for the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction for the greater one. 433 U.S. at 684.

And, in Brown v. Ohio, 432 U.S. 161 (1977), the defendant was prosecuted and punished for the crime of stealing an automobile after he had already been prosecuted and punished for the lesser included offense of operating the same vehicle without the owner's consent. This Court again reversed, holding that the Double Jeopardy Clause:

> "protects against a second prosecution for the same offense after

> acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969). Where consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. 432 U.S. at 165.

Accordingly, Harris and Brown, when read together, undeniably support the petitioners' claims that their consecutive sentences for the underlying felonies were improper. For, if two offenses are the same for purposes of barring successive prosecutions, as in Harris v. Oklahoma, supra, and if two offenses are the same for purposes of barring multiple punishments as in Brown v. Ohio, supra, the felony-murder and underlying felonies in the instant cases necessarily are the same for the purposes of barring dual convictions and consecutive sentences in a single prosecution.[3/] Brown v. Ohio, supra, in particular, would seem to control the petitioners' claims. It involves the precise issue presented here - punishment for both a greater offense and a lesser included charge. The fact that Brown v. Ohio, supra, presents the issue after two trials is beside the point. What offended the Double Jeopardy Clause in Brown was not the successive prosecutions, which in many

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3/ The petitioners direct this Court's attention to the fact that although both Harris v. Oklahoma and Brown v. Ohio were decided more than five months prior to the District of Columbia Court of Appeals' decision in Whalen, and more than ten months prior to the same court's decision in Pynes, there is no mention of those cases in either opinion below.

instances are not constitutionally prohibited, see Ashe v. Swenson, 397 U.S. 436 (1970), but rather the net result that the defendant was twice convicted of the same offense.

The courts' opinions below are also in conflict with two decisions by the United States Court of Appeals for the District of Columbia Circuit, United States v. Greene, 160 U.S. App.D.C. 21, 34, 489 F.2d 1145, 1158 (1973), cert. denied, 419 U.S. 977 (1974), and United States v. Dancy, 156 U.S.App.D.C. 399, 401, n.6 510 F.2d 779, 781 n.6. (1975). In Greene, the appellant was sentenced consecutively for the offenses of rescue of a federal prisoner and a felony-murder which occurred during that rescue. The Circuit Court, in vacating his conviction for the rescue offense, applied the Blockburger test and held that since the charge of felony-murder included every essential element of the rescue charge, there was a merger of offenses, and thus a consecutive sentence for the felony of rescue was improper. And, in Dancy, the Circuit Court relied on its previous decision in Greene and vacated the appellant's conviction for attempted robbery while armed since it was the underlying felony of his felony-murder conviction.

These cases all make it plain what the lower courts here failed to recognize: in every felony-murder prosecution, the underlying felony "merges" into the felony-murder conviction. Those two statutory violations are, for Double Jeopardy purposes, "the same offense", because one (felony-murder) has all the elements of the other (the underlying felony). By proving the underlying felony, the Government proves an element of first-degree murder (with its mandatory 20 years to life imprisonment) that obviate its necessity to establish premeditation and deliberation, the traditional elements of first-degree murder. It is precisely because proof of the felony supplies vital elements of the first degree murder charge that cumulative punishment for both felony-murder and the underlying felony

violates the Double Jeopardy Clause.

The conflicts detailed above justify the grant of certiorari to review the District of Columbia Court of Appeals' judgments in the cases at bar.

II. THE DECISIONS BELOW AFFIRMING THE TRIAL COURTS' IMPOSITION OF CONSECUTIVE SENTENCES ON PETITIONER WHALEN FOR FELONY-MURDER AND THE UNDERLYING OFFENSE OF RAPE AND ON PETITIONER PYNES FOR FELONY-MURDER AND THE UNDERLYING FELONY OF ARMED KIDNAPPING CONFLICT WITH THE DECISIONS OF THE HIGHEST COURTS OF SEVERAL STATES WHICH HAVE INTERPRETED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT IN THE FELONY-MURDER CONTEXT.

The District of Columbia Court of Appeals decisions below rejecting the merger doctrine in the felony-murder context are at odds with the decisions of the highest courts of several states. For example, in People v. Holiday, 21 Ill.App. 3d 796, 316 N.E.2d 236 (1974), a case in which the defendant was charged with three counts of murder (first degree, second degree and felony-murder), all arising out of one killing which occurred during the course of an attempted armed robbery, the court held that:

> where the defendant is charged with an attempt to rob that results in a felony murder, sentences cannot be imposed for both offenses. . . . The only permissible sentence is for the more serious offense. . . . 316 N.E.2d at 239. (footnote and citations omitted).

Other instances in which state appellate courts have applied the merger doctrine in the felony-murder context, vacating the conviction for the underlying offense on Double Jeopardy grounds, are: Newton v. State, 280 Md. 260, 373 A.2d 262 (Md. App. 1977) (conviction for attempted robbery vacated); State v. Woods, 286 N.C. 612, 218 S.E.2d 214 (1975) (convictions for kidnapping and rape vacated); State ex rel. Wikberg v. Henderson, 292 So.2d 505 (La.App. 1974) (conviction for attempted armed robbery vacated); State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972) (conviction for breaking and entering vacated); State v. Carlson, 5 Wisc.2d 595, 93 N.W.2d 354 (1958) (conviction for arson vacated). Contra, State v. Adams, 335

So.2d 801 (Fla. 1976) (robbery conviction reinstated -- no merger); State v. Chambers, 524 S.E.2d 826, 829 (Mo. 1975) (en banc) (felony murder, stealing -- no merger).

The above-cited state court cases support the petitioners' contentions below and also warrant the grant of certiorari in the instant cases.

CONCLUSION

For the foregoing reasons, writs of certiorari should issue to review the judgments and opinions of the District of Columbia Court of Appeals in both of the cases at bar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Consolidated Petitions For Writs Of Certiorari has been served by first class mail, postage prepaid, on the Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, this 25th day of September 1978.

Henry W. Asbill